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March 20, 2020

VIA ECF

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl St.
New York, New York 10007

Re: Lambda Legal Defense and Education Fund, Inc. v. United States Department of Health and Human Services, No. 19-cv-04707 (PKC)

Dear Judge Castel:

I am counsel for Plaintiff Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), along with co-counsel from Lambda Legal, in the above-referenced case brought against Defendant United States Department of Health and Human Services (“HHS”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I write respectfully on behalf of both parties to provide the Court with a status update, pursuant to the Court’s September 23, 2019 Order (Dkt. No. 21). A previous joint status report was filed with this Court on December 19, 2019 (Dkt. No. 22).

Since the December 19, 2019 status report, HHS has continued to process and produce documents according to the procedure in the parties’ joint letter of September 16, 2019 (Dkt. No. 19), as directed by the Court’s September 23, 2019 Order. Specifically, since the December 19, 2019 status report, HHS has processed a total of 1,555 pages of potentially responsive material and made three monthly productions, in which a total of 1,207 pages were released in full or with redactions. The remaining pages were withheld as exempt from FOIA (144 pages), sent to another agency for consultation (180 pages), or determined to be nonresponsive (24 pages). Together with HHS’s previous productions, HHS has now reviewed a total of 3,692 pages of potentially responsive material, and it has produced 3,004 pages, either in whole or in part, to Lambda Legal.

At this time, the parties are discussing potential ways to refine the searches associated with Lambda Legal’s FOIA requests, as the volume of potentially responsive documents based upon previously-agreed search parameters is close to 100,000 pages.¹ In February 2020, the

¹ Three FOIA requests are at issue in this litigation. The FOIA requests seek information about HHS’s activities regarding lesbian, gay, bisexual, transgender, and queer matters or people, and specifically pertain to HHS’s policies and decisions (“the Nondiscrimination Policies/935 Request”), the activities of politically appointed officials at HHS (“the HHS Officials/937 Request”), and coordination between HHS and outside organizations (“the Outside Organizations/936 Request”). As set forth in the parties’ September 16, 2019 joint letter and December 19, 2019 status report, HHS has run initial searches and

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parties agreed to deprioritize processing of the Outside Organizations/936 Request and shift to processing the HHS Officials/937 Request. At HHS's suggestion as a means to narrow the high volume of potentially responsive documents, Lambda Legal also agreed that HHS may exclude external listserv emails while processing the HHS Officials/937 Request, to enable HHS to process Lambda Legal's requests more quickly. The parties continue to exchange proposals regarding the scope of the HHS Officials/937 Request.

However, given the rate of processing and anticipated volume for this request, Lambda Legal has requested that HHS propose a date certain to finish production of the HHS Officials/937 Request instead of the current processing schedule of at least 500 pages per month. In response, HHS has offered to increase the rate of production by 40%. Lambda Legal has not accepted this proposal because, in Lambda Legal's view, it would result in an unacceptably long time before the end of production. Specifically, HHS previously estimated that there are 83,000 pages responsive to the HHS Officials/937 Request. Assuming that volume, with a 40% increase over the current processing rate, HHS would complete processing in approximately 10 years. As mentioned above, Lambda Legal and HHS have agreed to parameters that would reduce the volume of potentially responsive documents, and Lambda Legal and HHS continue to discuss scoping the HHS Officials/937 Request, which may further reduce the volume of responsive material.

Although HHS understands Lambda Legal's desire to obtain responsive documents quickly, Lambda Legal's three requests involve dozens, if not hundreds of custodians, amounting to tens of thousands of pages of potentially responsive documents.² In light of the breadth of Lambda Legal's requests, HHS has been attempting to negotiate refined search parameters since the outset of this litigation, while also agreeing to increase its processing rate by 40%. HHS is encouraged that Lambda Legal has now agreed to certain narrowing parameters, and HHS hopes that the parties can continue to discuss other narrowing proposals.³

HHS also notes that the ever-changing and unprecedented public health crisis caused by COVID-19 will also affect HHS's ability to increase processing speed. HHS is

located potentially responsive material for the Outside Organizations/936 Request and the HHS Officials/937 Request. The parties agreed to defer processing the Nondiscrimination Policies/935 Request to focus on the other two requests.

² One basis for the parties' agreement to defer processing the Nondiscrimination Policies/935 Request is because the volume is anticipated to be significantly greater than that of the other two requests because of the facial breadth of the Nondiscrimination Policies/935 Request.

³ HHS has been working to determine the scope of records potentially responsive to the HHS Officials/937 Request after removal of the external listserv emails, but HHS's FOIA processing software has been down and HHS does not currently have an estimate of the anticipated reduction in volume.

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understandably prioritizing public health issues. Moreover, the relevant HHS FOIA personnel as well as the assigned AUSAs in the USAO SDNY are on telework until further notice, which has resulted in significant off-site network usage and delays. Thus, although HHS has committed to process 700 pages per month and to continue negotiations over refinement proposals, the burdens imposed by the global pandemic may result in unavoidable delays.

At this time, the parties will continue negotiations with the goal of reaching a mutually agreeable processing and production schedule, including discussing potential refinements to the scope of the HHS Officials/937 Request. Should the parties not reach an agreement, Lambda Legal may request the aid of the Court ahead of the next status report.

We thank the Court for its consideration.

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Respectfully submitted,

/s/ Veronica Till Goodson

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cc: All counsel of record (via ECF)